Supreme Court, U.S.
FILED
APR 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1516

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1989

JOE FRANK HARRIS, Governor, et al.,

Petitioners,

v.

HORACE LUCKEY, III, et al.

Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

BRIEF OF TEN STATES AS AMICI CURIAE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

Table of Contents i

List of Counsel iii

Table of Authorities vi

Introduction 1

Interest of Amici 1

Summary of the Argument 5

Reasons for Granting the Writ 8

I. THE DECISION BELOW IS IN DIRECT CONFLICT WITH PRIOR DECISIONS OF THIS COURT

A. The opinion below is in direct conflict with this Court's holdings in Strickland v. Washington, 466 U.S. 668 (1984) and United States v. Cronic, 466 U.S. 648 (1984) 8

TABLE OF CONTENTS (Continued)

Page

B. The opinion below is in direct conflict with this Court's holdings in Younger v. Harris, 401 U.S. 37 (1971) and O'Shea v. Littleton, 414 U.S. 488 (1974) 15

II. THE DECISION BELOW CONFLICTS WITH DECISION OF OTHER COURTS OF APPEALS 21

III. THE DECISION BELOW PRESENTS A SUBSTANTIAL QUESTION OF FEDERAL LAW THAT SHOULD BE REVIEWED BY THIS COURT 28

Conclusion 35

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TABLE OF AUTHORITIES

Cases **Page**

Ake v. Oklahoma,
470 U.S. 68 (1985) 27
Avery v. State of Alabama,
308 U.S. 444 (1939) 15

Caplin & Drysdale, Chartered
v. United States,
489 U.S. (1989) 29, 34

Chik Kam Choo v. Exxon Corp.,
486 U.S. (1988) 20

Cuyler v. Sullivan,
446 U.S. 335 (1980) 12

Deakins v. Monaghan,
484 U.S. 193 (1988) 18

Dolan v. United States,
351 F.2d 671
(5th Cir. 1965) 29

Dommer v. Crawford,
638 F.2d 1031
(7th Cir. 1980) 23

TABLE OF AUTHORITIES (Continued)

Cases **Page**

Ex parte Grayson,
479 So.2d 76 (Ala. 1985) 32

Federal Trade Comm'n v. Superior
Court Trial Lawyers Ass'n,
489 U.S. (1990) 34

Gardner v. Luckey, 500 F.2d 712
(5th Cir. 1974) 21

Guerro v. Mulhearn, 498 F.2d 1249
(1st Cir. 1974) 19

Luckey v. Harris, 860 F.2d 1012
(11th Cir. 1989) ...1, 10, 21, 25,31

Mallard v. United States District
Court of the Southern District
of Iowa, 488 U.S. (1989) .33, 34

Mann v. Jett, 781 F.2d 1448
(9th Cir. 1986) 24

Martin County, Florida v. Makemsom,
491 So.2d 1109 (Fla. 1986) 30

TABLE OF AUTHORITIES (Continued)

Cases **Page**

Mason v. Arizona, 504 F.2d 1345
(9th Cir. 1974) 26, 27

Morris v. Slappy,
461 U.S. 1 (1983) 13

O'Shea v. Littleton, 414 U.S. 488
(1974) 15, 18, 20, 24, 25

Parker v. Turner, 626 F.2d 1
(6th Cir. 1980) 24, 25

People v. District Court of El Paso,
761 P.2d 206 (Colo. 1988) 32

Powell v. Alabama,
287 U.S. 45 (1932) 32, 33

Pugh v. Rainwater, 483 F.2d 778
(5th Cir. 1973) aff'd in part,
rev'd on other grounds sub nom.
Gerstein v. Pugh,
420 U.S. 103 (1975) ..10, 11, 22, 25

TABLE OF AUTHORITIES (Continued)

Cases **Page**

Schultz v. United States,
431 F.2d 907 at 913
(8th Cir. 1970) 26

Sparks v. Parker, 368 So.2d 528
(Ala. 1979), appeal dismissed,
444 U.S. 803 (1979) 32

State v. Rush, 46 N.J. 399,
217 A.2d 441 (1969) 33

Strickland v. Washington,
466 U.S. 668 4, 8, 9, 14, 17,
(1984) 19, 29, 34

Tarter v. Hury,
646 F.2d 1010
(5th Cir. Unit A. 1974) 21

United States v. Cronic,
466 U.S. 648 (1984) 4, 8, 12, 34

United States v. De La Cruz,
870 F.2d 1192
(7th Cir. 1989) 31, 32

TABLE OF AUTHORITIES (Continued)

Cases **Page**

United States v. Dillon,
346 F.2d 633
(9th Cir. 1965)
cert. denied 382 U.S. 978 30

United States v. Morrison,
449 U.S. 361 (1981) 16

United States v. Theriault,
440 F.2d 713 (5th Cir. 1971) 26

Wallace v. Kern, 499 F.2d 1345
(2nd Cir. 1974) 21

Williams v. Rubiera, 539 F.2d 470
(5th Cir. 1976) 21, 25

Wright v. State of Louisiana,
362 F.2d 95
(5th Cir. 1976) 29

Younger v. Harris,
401 U.S. 37 15, 18, 20,
(1971) 22, 23, 24

TABLE OF AUTHORITIES (Continued)

Cases Page

Constitutional Provisions

U.S. Constitution,
Amendment IV ..... passim

Statutes

Criminal Justice Act,
18 U.S.C. § 3006A 31

issue in state forums. State courts which try criminal cases would be placed in the tenuous, if not unnerving, posture of having the federal district court monitor day-to-day operations in search of sixth amendment violations, contrary to longstanding principles of equity, comity, and federalism.

The financial ramifications to the Amici States if certiorari is not granted and this case reversed, are enormous. Federal courts would be usurping the function of state legislatures by making determinations of how much indigent criminal defense attorneys are to be paid, and how funds and scarce resources should be allocated between the provision of criminal defense and other vital state concerns.

Finally, Amici States are seriously concerned that the panel opinion in the court below interprets the sixth amendment in a manner so inconsistent with this Court's precedent in Strickland v. Washington, 466 U.S. 668 (1984) and United States v. Cronic, 466 U.S. 648 (1984), as to make an adjudication, or defense, of future claims of ineffective assistance of counsel unworkable in any court.

The Amici States support petitioners' contention that certiorari is due to be granted and the opinion below reversed on the grounds that it is violative of the Eleventh Amendment, is incompatible with proper concerns of equity, comity and federalism, and is in direct conflict with this Court's and other appeals courts' precedent.

SUMMARY OF THE ARGUMENT

Contrary to equity, comity, and federalism the decision below defies this Court's and other appeals courts' precedent by requiring states to defend whether a class of indigent criminal defendants -- in the midst of their state court criminal trials -- are receiving, or in the future will receive, effective assistance of counsel.

The sixth amendment protects the right to a fair trial and guarantees that a conviction will not be upheld if a criminal defendant is not afforded effective assistance of counsel and is thereby prejudiced. By construing the sixth amendment to confer rights upon criminal defendants which do not affect the outcome of the trial, the Eleventh

Circuit opinion implies that it is appropriate for federal district courts to assume equitable jurisdiction over criminal defendants and state judicial proceedings at any time, to supervise and monitor ongoing state criminal proceedings based solely upon allegations of anticipated ineffective assistance of counsel. Such a suit is without equity for there are availabile adequate remedies at law by means of appeal and collateral review should counsel's assistance prove ineffective.

As a matter of federalism, the relief contemplated by this action is simply not available. State trial and appellate judges -- the courts of first resort should any challenge to the effectiveness of counsel be made -- would

become subject to constant federal scrutiny, possibly even contempt proceedings in federal court, should state criminal defendants be permitted to initiate federal proceedings such as those contemplated here during the pendency of their state court criminal trial. The panel opinion completely ignores legitimate and longstanding concerns for equity, comity, and federalism traditionally accorded the states by the federal courts with respect to the administration of state courts, prosecution of their criminal laws, and allocation of state resources.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS IN DIRECT CONFLICT WITH PRIOR DECISIONS OF THIS COURT

A. The opinion below is in direct conflict with this Court's holdings in Strickland v. Washington, 466 U.S. 668 (1984) and United States v. Cronic, 466 U.S. 648 (1984).

The sixth amendment requirement of effective assistance of counsel in criminal cases is a guarantee of the constitutional right to a fair trial. Strickland v. Washington, 466 U.S. 668, 686 (1984). In order to determine whether the assistance rendered was constitutionally deficient, the defendant must show first that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment;" and second that the "deficient performance prejudiced

the defense." Strickland, 466 U.S. at 687.

The sixth amendment guarantees that the outcome of the criminal proceeding will be arrived at fairly through the adversarial process. The focus, therefore, will be on whether the allegedly ineffective assistance rendered affected the outcome of the proceeding, and not simply whether ineffective assistance was rendered. Without a finding of prejudice, there is no constitutional violation. Because a claim of ineffective assistance of counsel is inextricably intertwined with what occurs at trial, it is impossible that constitutional violations under the sixth amendment can be determined beforehand.

But the Eleventh Circuit in the case below held that the sixth amendment somehow guarantees more than the right to a fair trial.

> The sixth amendment protects rights that do not affect the outcome of a trial. Thus, deficiencies that do not meet the "ineffectiveness" standard may nonetheless, violate a defendant's rights under the sixth amendment.

Luckey v. Harris, 860 F.2d 1012, 1017 (11th Cir. 1988). Citing, as an example, Pugh v. Rainwater, 483 F.2d 778, (5th Cir. 1973), aff'd in part, reversed in part on other grounds sub nom. Gerstein v. Pugh, 420 U.S. 103 (1975), the lower court held that since the fourth amendment rights of pre-trial detainees to a timely judicial determination of probable cause could be the

basis for prospective equitable relief, so too could the sixth amendment rights of indigent criminal defendants.

In the context of fourth amendment violations, reliance on Gerstein v. Pugh makes sense, for the right not to be unreasonably detained without probable cause becomes moot after trial, there is no remedy. But the analogy makes little sense in the context of alleged sixth amendment violations, for the right to the "effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated."

United States v. Cronic, 466 U.S. 648, 658 (1984).

What the Eleventh Circuit appears to have done is create a new civil cause of action for prospective equitable relief based upon allegations of future ineffective assistance of counsel, without any corresponding showing of inevitable prejudice. Compare Cuyler v. Sullivan, 446 U.S. 335 (1980), in which this Court held that actual, as opposed to potential, conflict of interests on the part of trial counsel representing multiple defendants must be shown before federal habeas corpus relief is available. There is no precedent for the proposition that anticipated ineffective assistance of counsel is remediable in a suit for prospective injunctive re-

lief; actual prejudice must be shown.

A similar novel attempt to create new sixth amendment rights has been tried before and expressly rejected by this Court. In Morris v. Slappy, 461 U.S. 1 (1983), the Court rejected a claim that the sixth amendment guarantees a "meaningful attorney-client relationship." Id. 461 U.S. at 14. Without citing authority, and without indicating what constitutional rights are at issue beyond the right to a fair trial, the Eleventh Circuit also interprets the sixth amendment in a novel way inconsistent with this Court's precedent.

This Court has also refused to apply a "per se" rule as to what level of effectiveness is to be expected in any given case, which would be required in

order to determine whether a violation can be expected to occur. "More specific guidelines are not appropriate. The Sixth Amendment refers simply to 'counsel,' not specifying particular requirements of effective assistance." Strickland, 466 U.S. at 688. By suggesting that the sixth amendment protects rights which do not affect the outcome of the trial, the Eleventh Circuit effectively does away with the requirement of prejudice, negates the Strickland test of how to establish a constitutional violation based on ineffectiveness of counsel, and creates a novel and unprecedented cause of action.

B. The opinion below is in direct conflict with this Court's holdings in Younger v. Harris, 401 U.S. 37 (1971) and O'Shea v. Littleton, 414 U.S. 488 (1974).

This Court has long been hesitant to interfere with states' administration of their criminal laws. See, Avery v. State of Alabama, 308 U.S. 444 (1939). Petitioner has already briefly addressed the abstention doctrine under Younger v. Harris, 401 U.S. 37 (1971) and O'Shea v. Littleton, 414 U.S. 488 (1974); and Amici States will not belabor the point except to emphasize their concern, and in particular, the concern of the states' judiciaries should certiorari not be granted and the case reversed.

A number of concerns become readily apparent if a little thought is given as to what relief, if any, could be ordered

if respondents were to prove at trial that "systemic deficiencies" exist in the manner in which Georgia's indigent defense system is administered. Remedies of sixth amendment violations must be narrowly tailored to the injury. United States v. Morrison, 449 U.S. 361 (1981). Assuming that the Eleventh Amendment were no bar to a declaration that the amount of fees paid indigent defense counsel was insufficient under the sixth amendment, and assuming further that respondents could show that higher fees improved the adequacy or effectiveness of counsel, there remain claims outstanding against the defendant class of trial judges regarding the manner in which the court systems are administered.

Surely a federal court would not order the state trial judges to, for example, establish guidelines to measure the pending effectiveness of counsel appointed to indigent defendants. The concept of guidelines for trial courts to follow has been expressly rejected by this Court. Strickland, 466 U.S. at 688-689. Allegations of ineffective assistance of counsel must, by their very nature, be decided on a case-by-case basis. But assuming the district court did enter such an order, would every alleged failure on the part of trial counsel prompt a cause of action for criminal defendants to bring against the trial judge presiding over their case, ostensibly for failing to ensure the de-

sired level of effectiveness? See, O'Shea, 414 U.S. at 501-502.

Judge Edmondson's dissent from denial of rehearing en banc is persuasive: "If a state judge does not obey a district judge's injunction, are we willing to jail the state judge for contempt?" The chilling effect the prospect of federal contempt power looming over the heads of state judges in the daily administration of their courts would be overwhelming. This is the type of federal-state friction the abstention doctrine announced in Younger v. Harris and its progeny was intended to prevent.

An additional concern is what effect an adjudication of across-the-board ineffective assistance of counsel in federal court would have on the pending, as

well as disposed of, cases of the plaintiff class of indigent criminal defendants. Presumably, that would mean that the ineffectiveness prong of the Strickland test would already be adjudicated, or res judicata, with respect to any subsequent attack on a conviction. Worse, it would be res judicata with respect to any pending or impending trial of any present class member. Cf. Deakins v. Monaghan, 484 U.S. 193, 208 (1988) (White and O'Connor, JJ., concurring). Compare in this regard, Guerro v. Mulhearn, 498 F.2d 1249, 1254 (1st Cir. 1974).

But the cornerstone of the abstention doctrine is that the federal plaintiffs will suffer immediate and irreparable injury, and must have no remedy at

law. O'Shea, 414 U.S. at 502. The respondents clearly have an adequate remedy at law, by means of appeal in the state courts wherein they can raise the same claims or in postconviction collateral review. Id. There is no evidence or argument that state courts are not competent to entertain respondents' federal claims; state courts are in fact presumed competent. Cf. Chick Kam Choo v. Exxon Corp., 486 U.S. , (1988). To presume otherwise, as apparently did the Eleventh Circuit, is directly contrary to the dictates of Younger and O'Shea.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS

As stated by the dissent in the court below and by the petitioners, the panel opinion is in direct conflict with a number of other courts of appeals' decisions including Gardner v. Luckey, 500 F.2d 712, 715 (5th Cir. 1974); Tarter v. Hury, 646 F.2d 1010 (5th Cir. Unit A. 1981); and Wallace v. Kern, 499 F.2d 1345 (2nd Cir. 1974). Amici States will not repeat the analysis. But the opinion below is in direct conflict with decisions of other courts of appeals as well.

In addition to those cited above, another case in direct conflict with the Eleventh Circuit's opinion in Luckey is Williams v. Rubiera, 539 F.2d 470 (5th

Cir. 1976), a declaratory judgment action against criminal judges in Dade County, Florida in which it was alleged that persons charged with welfare fraud were not being appointed counsel. The Fifth Circuit affirmed dismissal of the action on Younger abstention grounds, holding that plaintiff's claims could be presented to the state court. "An injunction against a trial without appointed counsel would, of course, be direct federal interference in the state criminal prosecution." And it expressly rejected the argument that the action was governed by Gerstein v. Pugh, distinguishing the fourth amendment pretrial rights from those directed at the fairness of the trial.

noted that as in O'Shea, the plaintiffs had adequate remedies at law and that "other less intrusive avenues of relief were available: appeal within the state system, federal habeas corpus relief, federal criminal prosecution of state judges." Parker, 626 F.2d at 7. The court further noted that "federal interference with the state proceedings would be as serious here as it was feared to be in O'Shea." Id. at 8. Like the Fifth Circuit in Williams, but contrary to the Eleventh Circuit's analysis in Luckey, the Sixth Circuit did not find the fourth amendment rationale in Gerstein v. Pugh controlling. Id.

Among plaintiffs/respondents' claims in Luckey are that they are "denied investigative and expert resources neces-

sary to defend them effectively." Luckey, 860 F.2d at 1018. If true, the relief contemplated would require the anticipatory measurement of some quantum of what resources are necessary in any given case. But the "standards to govern what is 'necessary to an adequate defense' are not susceptible of arbitrary articulation but can best be developed on a case by case basis. Schultz v. United States, 431 F.2d 907 at 913 (8th Cir. 1970) (concurring opinion). United States v. Theriault, 440 F.2d 713, 715 (5th Cir. 1971). The Eleventh Circuit apparently disagrees.

And in Mason v. State of Arizona, 504 F.2d 1345 (9th Cir. 1974), the court of appeals held that "such assistance is not automatically mandatory but rather

depends upon the need as revealed by the facts and circumstances of each case." Mason, 504 F.2d at 1352. Thus, while all are in agreement that particular cases may warrant access to certain resources, cf. Ake v. Oklahoma, 470 U.S. 68 (1985), the Eleventh Circuit's opinion, in holding that respondents have stated a claim upon which declaratory or injunctive relief can be granted prior to conviction, conflicts with the decisions of the Eighth, Ninth and former Fifth Circuits as to when that decision can be made.

III. THE DECISION BELOW PRESENTS A SUBSTANTIAL QUESTION OF FEDERAL LAW THAT SHOULD BE REVIEWED BY THIS COURT

Another example of the potential conflict between state and federal judiciaries contemplated by the anticipated relief in this case involves the relationship between the state courts and attorneys who appear before them. Given the relief anticipated in this case, federal courts would be monitoring not only the actions of state judges, but closely scrutinizing the legal and tactical decisions of appointed counsel in any given case prior to conviction. This would necessitate the interposition of the federal courts between the state bench and its bar, clearly an unworkable remedy.

As suggested by the dissent in Luckey, federal habeas corpus would become unnecessary if criminal defendants were permitted to challenge the effectiveness of their counsel in the midst of criminal trials. Cf., Caplin & Drysdale, Chartered v. United States, 489 U.S. , at , n. 9 (1989) ("We see no reason why our cases such as Strickland v. Washington, 466 U.S. 668 (1984), are inadequate to deal with any such ineffectiveness where it arises.")

The question of compensation of appointed attorneys and appropriation of resources is one for the state legislature, not the courts. See, Wright v. State of Louisiana, 362 F.2d 95 (5th Cir. 1966); and see, Dolan v. United States, 351 F.2d 671 (5th Cir. 1965);

and United States v. Dillon, 346 F.2d 633 (9th Cir. 1965), cert. denied 382 U.S. 978. The Eleventh Circuit's opinion conflicts with those decisions.

Similar issues have been raised in other courts, in which criminal defendants or their attorneys have attempted to tie the sixth amendment rights of indigent defendants to the amount of fees the appointed attorneys are paid. See, e.g., Martin County, Florida v. Makemson, et al., 491 So.2d 1109 (Fla. 1986), cert. denied. 479 U.S. 1043 (1987), in which the Florida Supreme Court struck down the maximum fee limitations for compensation to appointed attorneys in extraordinary cases on the grounds that, as applied, criminal defendants' sixth amendment rights may be

impaired. Justice White's dissent from denial of certiorari, 479 U.S. 1043, is sound argument why certiorari should be granted in Luckey.

If certiorari is not granted, the federal courts may next be subject to attack on the grounds that the fee schedule provided for in the Criminal Justice Act deprive criminal defendants of their sixth amendment rigths. In United States v. De La Cruz, 870 F.2d 1192 (7th Cir. 1989), the Seventh Circuit ruled against a sixth amendment challenge to the fee schedule under the Criminal Justice Act, 18 U.S.C. § 3006A, holding that "in return for membership in the professional bar, an attorney must accept court appointments to represent an indigent...in order to preserve

his Sixth Amendment right to counsel." De La Cruz, 870 F.2d at 1194. Citing Powell v. Alabama, 287 U.S. 45 (1932), the court noted the constitution does not even require compensation to appointed attorneys.

In accord with the Seventh Circuit that the quantity of compensation does not dictate the quality of representation and that it is the attorneys' professional obligation as members of the bar and officers of the court to represent their clients zealously without regard to the amount of fee are cases such as Sparks v. Parker, 368 So.2d 528 (Ala. 1979), appeal dismissed 444 U.S. 803 (1979); Ex parte Grayson, 479 So.2d 76 (Ala. 1985); People v. District Court of El Paso, 761 P.2d 206 (Colo.

1988); and State v. Rush, 46 N.J. 399, 217 A.2d 441 (1969). Accord, Mallard v. United States District Court of the Southern District of Iowa, 488 U.S. , (1989); see again, Powell v. Alabama, 287 U.S. 45. But the result of the Eleventh Circuit's decision directly conflicts with the presumption that appointed counsel, as officers of the court and members of a profession will serve their appointed clients effectively and competently.

Although this Court has never directly addressed the issue of whether a particular level of compensation can be constitutionally related to the effectiveness of counsel, or whether claims of anticipatory ineffective assistance of counsel are justiciable outside the

context of cases such as Strickland v. Washington and United States v. Cronic, it has in passing suggested otherwise. Cf., Mallard v. United States District Court, supra; Caplin & Drysdale, Chartered v. United States, supra; and Federal Trade Commission v. Superior Court Trial Lawyers Assoc., 489 U.S. (1990). If the petition for writ of certiorari is granted, those questions should be answered in the negative.

CONCLUSION

For the reasons stated by Petitioners and for the reasons stated above, the petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit should be granted and the decision below reversed by this Honorable Court.

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